IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR

THE NINTH CIRCUIT

Mrs. Glenn D. Hart and Glenn D. Hart,
Appellants,

vs.

Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace,
Appellees,

AND

W. C. Harding Land Company, a corporation,
Appellant.

vs.

Mrs. Glenn D. Hart and Glenn D. Hart,
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BRIEF OF APPELLEES ADAIR, ET AL.

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STATEMENT OF THE CASE.

It is necessary that there should be some correction of the Statement contained in the brief of Appellants Hart. It is said that the Appellees paid $50.00 per acre for the land, but it is not made clear that they paid $50.00 as the average price per acre for a large trace including the land in question, and that more than 100 acres of the tract purchased was without value, and the land in question was the choicest part of the larger tract. Again it is said that it appears from the contract between the Appellees and the Harding Land Company that it was the clear understanding between the parties that the Land Company in making contracts with purchasers might include an agreement for the planting and cultivation of the tracts sold. The original contract is repeated in the contract of September 10th, 1910, beginning at page 52 of the Transcript of Record, and a reading of the two contracts shows that it was not the intention of the parties that the agreement with reference to planting and cultivation of the lands should be included in the sales contracts. It further appears from the agreement, page 55 of Transcript, tha the Harding Land Company was to make the contracts of sale in its own name, and Appellees were not to be known in connection with the sales until the time came to make deeds, after full payment.

POINTS AND AUTHORITIES.

I.

When a party, with knowledge of facts entitling him to rescission of a contract or conveyance, afterward, without fraud or duress, ratifies the same, he has no claim to the relief of cancellation. An express ratification is not required in order thus to defeat his remedy; any acts of recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it, have the effect of an election to affirm. "This doctrine seems to rest not upon the principle of a new contract between the parties, nor yet upon the ordinary principle of estoppel **in pais**, but rather upon a distinct principle of public policy, that all that justice or equity requires for the relief of a party having such cause to impeach a contract is that he should have but one fair opportunity, after full knowledge of the rights, to decide whether he will affirm and take the benefits of the contract or disaffirm it and demand the consequent redress. Any other rule would be regarded as unjust, even toward the party guilty of the wrong out of which grows the right to rescind."

6 Cyc. 297-8.

II.

The general principles of waiver and laches apply in suits for rescission. The complainant must have been diligent in seeking his remedy, and must

not have slept upon his rights; and if with knowledge of the facts which give him a right to seek rescission he has been guilty of an unreasonable and unnecessary delay in availing himself of his remedy, a Court of equity will deny him relief. Similarly any conduct of the complainant sufficient to show an election by him to affirm the contract or abide by its obligations will ordinarily be sufficient to bar his right to rescission. The waiver of the right to rescind may be implied from conduct inconsistent with an intention to exercise the right; such as acquiescence in the transaction for an unreasonable length of time.

24 Am. & Eng. Enc. Law, 2nd ed. p. 625;
Potter Realty Co. v. Breitling, (Oregon) 155 Pac. 179.

III.

The right to rescind a contract upon the ground of fraud may be lost by delay, as it is the duty of the person claiming to have been defrauded to act promptly upon discovery of the fraud. He cannot sit on the fence and wait for developments to indicate whether his interest will call for affirmance or rescission. If he is to rescind he must do so promptly. Acts of ownership after knowledge of the alleged fraud will preclude rescission.

Scott v. Walton 32 Or. 460, 52 Pac. 180, 181;
Dundee Mortgage and Trust Company vs. Goodman, 36 Or. 453, 60 Pac. 3;
Vaughn v. Smith, 34 Or. 54, 55 Pac. 99;

Elgin v. Snyder, 60 Or. 297, 118 Pac. 280;
Whitney v. Bissell, ... Or. ..., 146 Pac. 141;
L. R. A. 1915 D. 257;
Shappirio v. Goldberg, 192 U. S. 232, 48 L. ed. 419.
Grymes v. Sanders, 93 U. S. 62, 23 L. ed. 798;
Simon v. Goodyear Metallic Rubber Shoe Co., 44 C. C. A. 612, 105 Fed. 573, 52 L. R. A. 745.

IV.

Under all the authorities, after a party claiming to have been defrauded has acquired knowledge of the facts, if he affirms the contract there can be no rescission

Faulkner v. Wassmer, (N. J.) 77 Atl. 341, 30 L. R. A. (N. S.) 872, and note in L. R. A.
14 Am. & Eng. Enc. Law (2nd ed.) 159, 161.

V.

The contract between the Appellees and the W. C. Harding Land Company cannot be construed as creating a partnership, if for no other reason because the Land Company, as a corporation, could not enter into a partnership.

Salem-Fairfield Tel. Ass. v. McMahan (Or.) 153 Pac. 788;
Wheeler v. Lack, et al, 37 Or. 238, 61 Pac. 849;

Hanthorn v. Quinn, 42 Or. 1, 69 Pac. 817, 18 L. R. A. (N. S.) note at page 1089;
Corbin v. Holmes, 83 C. C. A. 367, 154 Fed. 593.

VI.

Even though it should be held that the contract between the Appellees and the Harding Land Company created the relation of principal and agent, still the sales in question were made by a sub-agent of the Harding Land Company, and the power delegated to an agent cannot be delegated without the authority of the principal, and it is not claimed that there was any such authority in this case. The principal is not liable for the acts of the unauthorized sub-agent.

2 Corpus Juris, page 685, section 342;
Sorenson v. Smith, 65 Or. 78, 129 Pac. 757;
Winkleblack v. National Exchange Bank, 155 Missouri App. 1, 136 S. W. 712.

VII.

If it be held that the Harding Land Company was the agent of the Appellees, it had only a restricted power to sell, that is to say, it could only find purchasers on such terms as would allow the land owners a certain price for their lands, and while it was to make contracts of sale in its own name, the Appellees only could issue deeds. An agent with restricted power to sell has no power to bind his principal by any representation as to the quality of the land.

2 Corpus Juris, page 616, section 251, and cases cited;

Samson v. Beale, 27 Wash. 557, 68 Pac. 180;

Mayo v. Wahlgreen, 9 Colorado A. 506, 50 Pac. 40.

VIII.

Representations as to prospective profits from the peach trees cannot be relied upon as statements of fact, but amount only to expressions of opinion.

39 Cyc. 1274;

Gordon v. Parmelee, 2 Allen 212.

IX.

The contract between the Apellees and the Harding Land Company did not create the relation of principal and agents.

Tucker v. Gibson, (Kan.) 101 Pac. 633;

Kern v. Feller, (Or.) 70 Or. 140, 140 Pac. 735;

Samson v. Beale, 27 Wash. 557, 68 Pac. 180;

Mayo v. Wahlgreen, 9 Colo. A. 506, 50 Pac. 40;

Iowa R. Land Co. v. Fehring, 126 Iowa 1, 101 N. W. 120.

X.

Appellees cannot be charged as having ratified the contracts in question because it appears that they had no knowledge of the alleged representations prior to the filing of suit, and any apparent act of ratification would not be binding upon them so long as it appears that they had not full knowledge of all

the material facts and circumstances relative to the transaction.

2 Corpus Juris, page 476, section 93;
O'Shea v. Rice, (Neb.) 69 N. W. 308, 310;
Murphy v Clarkson (Wash.) 66 Pac. 51.

XI.

If the Appellees were liable in this suit which is brought merely for rescission of contract, they should not be held liable for anything more than the money actually shown to have been paid to them. Complainant has made no effort to trace the money into the hands of the Appellees.

Daniel v. Mitchell, Fed. cases 3562, 1 Story 172;
Mason v. Crosby, 1 Woodb. & M. 342, Fed. cases No. 9234;

XII.

Assignment by the purchasers of two of the three contracts in question affirmed the contracts and prevents rescission, especially as the assignments were made after full knowledge of the facts.

Cooper v. Hillsboro Garden Tracts, (Oregon,) not yet officially reported, 152 Pac. 488.

XIII.

Appellees cannot in any event be held liable in this suit because the contracts of sale were under seal and Appellees were not parties thereto or men-

tioned therein, and the law is well settled that an undisclosed principal cannot be held liable upon a contract under seal executed by an agent in his own name.

2 Corpus Juris, page 843, section 524, and authorities cited;
2 Mechem on Agency, 2nd ed. section 1734, and authorities cited;
Barbre v. Goodale 28 Or. 465, 472;
Willard v. Wood, 135 U. S. 309, 313, 34 L. ed. 210 at 213;
Badger Silver Mining Company v. Drake. (C. C. A. Fifth Cir.) 88 Fed. 48, 31 C. C. A. 378;
Denike v. DeGraaf, (N. Y.) 87 Hun. 61;
Klein v. Mechanics and Traders Bank, 145 N. Y. App. Div. 615 at 617.

XIV.

When lack of jurisdiction apears, the court should dismiss the suit of its own motion.

Morris v. Gilmer, 129 U. S. 315, 326, 32 L. ed. 690;
Farmington v. Pillsbury, 114 U. S. 143, 29 L. ed., 114;
Minnesota v. Northern Securities Co., 194 U. S. 48, 62; 48 L. ed., 870;
Steigleder v. McQuesten, 198 U. S. 141, 142, 49 L. ed. 986.

ARGUMENT.

Plaintiffs are attempting to hold the Appellees Adair, Epperly, Burns, Green and Wallace responsible for representations not made by them or in their names or authorized by them. The contracts of sale in question were made in the name of the W. C. Harding Land Company, as though it were the owner of the lands. Adair, et al, the land owners, were not known to the respective purchasers.

The contract between the land owners and the company expressly provided that the contracts of sale should be made in the land company's own name, and therefore the owners are not chargeable with having held the company out to the public as their agent. Had they so held the company out as agent, their liability might exceed that created by the written contract between them and the company, under well-known principles of the law of agency. The purchasers of the lots dealt with the Harding Land Company as principal, and not as agent, as shown by the contracts of purchase, which are in evidence.

The land company contracted not only to convey the land, but also to plant and cultivate. At the same time the contract between land owners, Appellees herein, and the Harding Land Company expressly provided against the land owners deriving any benefit from or suffering any burden on account

of the planting and cultivation contracts. The land owners were to have $200.00 per acre for their land, and the company added to this price $150.00 per acre to cover cost of platting, making sales and planting and cultivation, making the price of the land, planted and cultivated for three years, $350.00 per acre.

From the Bill of Complaint it is impossible to say whether the plaintiffs intended to try to hold Adair, et al, liable as partners of the land company, or as having actively taken part in the sale of the lands through the sales agent Kendall, or as the principals bound by the acts of an agent. The brief for Appellants proceeds upon the last-named ground alone. We wish to mention in passing that the contract between the owners and the company did not create a partnership. The company, as a corporation, could not enter into a partnership, Salem-Fairfield Tel. Assn. v. McMahan (Or.) 153 Pac. 788; Wheeler v. Lack, et al, 37 Or. 238, 61 Pac. 849; Hanthorn v. Quinn, 42 Or. 1, 69 Pac. 817; 18 L. R. A. (NS) note at page 1089; Corbin v. Holmes, 83 C. C. A. 367, 154 Fed. 593.

It is proposed by the Appellants Hart to charge these Appellees as undisclosed principals, not of the Harding Land Company with whom Appellees contracted, but of a sub-agent of the Harding Land Company, one Kendall, who made the sale of all the tracts in question. See Transcript of Record pages

72, 80 and 94. Even if it should be held that the contract between the Appellees and the Harding Lang Company created the relation of principal and agent, still the power given the agent, being a delegated power, could not be delegated. "The general rule is that the agent in whom is reposed trust or confidence, or who is required to exercise discretion or judgment, may not entrust the performance of his duties to another without the consent of his principal, and, since nearly all acts of agency involve discretion and the very selection as agent ordinarily implies personal confidence in the agent chosen, it follows that one clothed with authority to act for a principal must ordinarily perform the act himself, and cannot, without the principal's consent delegate it to another." 2 Corpus Juris, page 685, section 342. In this case, as the pleadings and evidence show, Kendall was a total stranger to the Appellees and was not an officer of the Harding Land Company. Appellees not only had no knowledge of the representations which Kendall may have made, but it cannot be presumed that they authorized his employment or the making of any representations by him, even though the Harding Land Company should be held to be an agent. Many authorities are cited in Corpus Juris and it is unnecessary to reprint the list here. We would in addition call attention to the case of Sorenson v. Smith, 65 Or. 78, 129 Pac. 757, in which the decision was in line with the principle

quoted from Corpus Juris. In the Missouri case of Winkelblack v. National Exchange Bank, 155 Mo. App. 1, 136 S. W. 712, it was pointed out that if an agent could appoint another agent without the principal's authority, and he another agent, and the principal should be held liable, for all of them, such agglutination would result in an endless chain of interlopers and necessarily revolutionize all present business methods. If the Harding Land Company was an agent and could delegate its power to Kendall, Kendall could delegate to some one else, and so on without end, and the land owners would have stood in a most precarious position simply because they had made a contract by the terms of which they were to make deeds to the land when they received payment therefor. The complainant and her assignors having dealt with Kendall whom they knew to be an agent of the Harding Land Company and having entered into written contract with the Harding Land Company alone, as though the latter was the owner of the land, and not looking to any person or persons beyond the Harding Land Company, it seems contrary to natural justice to attempt to stretch the law of agency so as to hold the Appellees liable for the alleged representations of Kendall.

Instead of the relationship of principal and agent existing, both the company and the owners

were principals. The owners having the land, the company was at its own expense to survey and plat it and put it on the market. For such purchasers as so desired the company proposed to plant and cultivate fruit trees. The owners were not chargeable with any part of the expense of platting or selling or planting or cultivating. Neither was the company bound to see that the mortgage on the land was paid or a good title furnished. Suppose the company had not paid the surveyor for platting the land, or the nursery company for trees furnished, could the land owners have been held responsible for the company's contracts made in its own name for these things? We think not. It was the same as to sales. The company was selling in its own name.

The owners had given to the company what amounts to an exclusive option on the land for a definite period, with immediate possession. The case is far from being the ordinary one where a real-estate broker negotiates a sale as agent for another and the purchaser knows he is dealing with an agent and looks beyond the latter to the principal.

If it should be considered that the contract between the Appellees and the Harding Land Company created a relationship of principal and agent, still the Harding Land Company had only a restricted power to sell, that is to say, it was bound to realize a certain price for the land owners, deeds to be made

by the land owners only, etc., and it is the law that an agent with restricted power to sell has no power to bind his principal by any representation as to the quality of the land. 2 Corpus Juris, page 616, section 251, and cases cited. In the case of Samson v. Beale, 27 Wash. 557, 68 Pac. 180, an agent who had authority to collect, and remit rents, pay taxes, look after ordinary repairs, and in addition had authority to sell, found a purchaser for a building and made certain representations with reference to the condition of the building, which proved to be false. The Trial Court instructed the jury that an agent clothed with authority to sell property, without other limitation than the price, has authority to do all things usual or necessary to carry into effect the power delegated to the agent, and that any representations made by the agent to the purchaser as to the foundation walls of the building would bind the principal as though the principal had made the representations himself. The Supreme Sourt held these instructions to be erroneous and reversed the case. In the case of Mayo v. Wahlgreen, 9 Colorado A. 506, 50 Pac. 40, H. was the owner of 40 acres of land which it was agreed that M. might sell, if he could, provided he realized $4000.00 for the owner. H. gave M. no authority to make any representations respecting the price, value or situation of the property, and the person who purchased through M.'s efforts had no dealings with H. whatever. The Court

held that M. was not the agent of H. in the sense that he could bind H. by representations as to value.

In the case of Tucker v. Gibson, (Kansas), 101 Pac. 633, it was held that one who sold land as owner, the vendee dealing with him as such,—though the naked legal title was in another, was not the agent of the owner.

A case in which the facts were in part like those of the present case is that of Kern v. Feller, 70 Or. 140, 140 Pac. 735. In that case a land owner empowered an agent to plat or subdivide his lands in a town site and to sell the town lots therein upon any terms the agent might see fit, provided that no lot be sold for less than $50.00, and the owner agreed that upon the payment of $50.00 in cash he would execute title to the purchaser. After the owner had received a certain price for his lands the remaining lands in the tract were to be deeded to the agent. A purchaser of certain lots in the tract rescinded his contract on the ground that the defendant had failed to make and execute a deed for the property. It is pointed out in the opinion in two places that the contract of sale was executed by the agent and the plaintiff and it did not refer to the defendant land owner in any manner, nor did it purport to have been executed by an agent. It also appeared that the purchaser had made payment to the agent, but the court refused to hold the land owner liable for any

of the money paid, because the agent received payment as vendor of the lots and the proceeds received by the agent were spent defraying its expenses. The land owner was held not liable for the exploiting of the town site. It appears to us that this case turned upon the point that althought the purchaser had paid for the lands purchased yet he had dealth with the agent as a principal and as the land owner had not received payment for his land, he was not liable for money received by the agent. Of course the breach claimed in that case was failure to make title, and not misrepresentation, but the land owner had stipulated in his contract, that he would execute a good and lawful title to the purchaser of any lot upon payment of $50.00 in cash. Payment was made to the party with whom he contracted as selling agent. The Court in that case did not go back of the sales contract to look up the liability of an undisclosed principal. We think the same principle applies in this case and as the purchasers here contracted with and relied upon the Harding Land Company alone, and as that company was not a mere agent, but was in fact a principal investing in its own name in the venture, and liable for its own contracts, the land owners ought not to be held in this case as undisclosed principals.

A question analogous to that involved in this case has arisen in a class of cases in which parties

have embarked in joint adventures and afterwards the unsuccessful attempt has been made to hold one of the parties liable for debt created by the other, upon the principle of mutual agency, as in the case of partnership. Examples of such cases are found in Morback v. Young, 51 Oregon, 128, 94 Pac. 35; Klosterman v. Hayes 17 Oregon 325; Wheeler v. Lack 37 Oregon 238, 61 Pac. 849; Hanthorn v. Quinn 42 Or. 1, 69 Pac. 817. Where one person owns and operates a saw mill at his own expense, and another person, at his own expense, furnishes the mill with logs to be converted into lumber, each of the parties to have one-half of the lumber, there is no partnership so as to hold one party liable for the debts created by the other. Hodges v. Rogers, 115 Georgia, 951, 42 S. E. 251; Padgett v. Ford, 117 Ga. 508, 33 S. E. 1002; Thornton v. George, 108 Georgia 9, 33 S. E. 633.

The agreement between the Appellees and the Harding Land Company expressly provided that every contract which the Harding Land Company might make for the sale of any of the land should be made in its own name, and this we take it shows an intention not to create the relation of principal and agent.

As shown by the Record, Hart, husband of Mrs. Glenn D. Hart, who is joined with her as plaintiff in this suit, was for a considerable period of time after the purchase of the lots in question a stock-

holder, director, vice-president and sales manager of the Harding Land Company, which company he claims sold the lands in question under fraudulent misrepresentations. In fact Hart became a partner of Kendall, the sub-agent who negotiated these sales. He was selling the same kind of lands for the Harding Land Company and therefore had every opportunity to become informed as to the facts. The evidence shows that at different times while he was thus connected with the company he saw the lots in question, expressly agreed to the substitution of pear trees for peach trees, more than once expressed his satisfaction with the land and with the country, and at the expiration of the three year period of cultivation provided in the Harding Land Company's contract he took over the two lots of himself and wife to be cared for by himself. He first saw the lots in January, 1911, again in February, 1912, and again in July, 1912. He became sales agent of the Harding Land Company in March, 1911. See Transcript of Record, pages 82 and 83. In April, 1912, he remitted to the Harding Land Company $400.00 to apply on the purchase price, and this he admits was after his second visit to the land. See Transcript of Record page 85. The lots were sold in the spring of 1910, while this suit was filed on March 9th, 1914. Hart acted for himself and for his wife and practically also for Mrs. Peterson, the remaining assignor of plaintiff, who was an old friend of the Harts. In

the case of Grymes v. Sanders, 93 U. S. 62, 23 L. ed. 798, at page 802, of 23 L. ed. Mr. Justice Swayne says: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once indicate his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose."

It is true that Mrs. Peterson did not have the same opportunity as the Harts to know the facts. Yet the Record shows that full settlement was made with her as to the matter of peach trees, and she had no other ground of complaint whatever, her claims that there were stones on the land being proven false. She denies that she made the subsequent contract with reference to the replacing of the peach trees with pear trees, but the weight of the testimony is against her. Against her is the writing given her by the Harding Land Company which was produced in Court, and also the testimony of the witness Hinkley. When she made the arrangement as to the substitution of pear trees for peach tress she affirmed the contract as thus modified. Furthermore with reference to the matter of the growing of peaches on the

tract, the most that is claimed for complainant is that the sub-agent of the Harding Land Company represented that the land would produce peaches profitably. There was no representation that the land ever had produced peaches. Honest men might differ upon a subject of this kind, and affirmations as to what a land will produce as distinguished from representations as to what it has produced in the past, furnish no ground of presuming any fraudulent intent. See 39 Cyc. 1274; Gordon v. Parmelee, 2 Allen 212. However, even the representation as to peaches was corrected with the consent of all parties by the agreements to substitute pear trees and by the actual substitution of the pear trees on the two Hart lots. The reason the substitution did not actually take place on Mrs. Peterson's lot was that the suit was begun before the proper season for planting the pear trees had arrived.

As bearing further upon the question of laches and delay we call attention to the evidence in the Record which shows that when these contracts of sale were made there was great demand for fruit lands in the locality in question and prices were high. Four years afterwards when the suit was filed the boom had collapsed. The testimony on this subject comes from different witnesses and is undisputed. See for example the testimony of witness St. John, beginning at the bottom of page 156 of the

Transcript of Record. An instructive case is the Oregon case of Potter Realty Company v. Breitling, 155 Pac. 179, decided February 15, 1916. In that case there had been a sale of property during boom times and after the tide of speculation had receded the purchaser sought to repudiate the contract of purchase on the ground of fraudulent representations. In that case the delay after knowledge or opportunity to have knowledge was much less than in this case. At page 183 of the report the Court, in the opinion, points out that one who claims that he has been induced to enter into a contract by deceit cannot retain the advantages of the agreement in order to determine whether or not a disaffirmance is the more profitable course to pursue, for rescission demands prompt action on the part of the defrauded party, and any unreasonable delay in asserting a disaffirmance of the contract will be considered as an election to treat it as continuing, and any right of action will be limited to a recovery of the damages which he has suffered. In that case the defendant testified that having heard rumors to the effect that the statements made to him at the time of the sale were false he ceased making further payments, but did not visit and inspect the lots until more than six months thereafter, when he found that such representations were untrue. The Court said that he resided within a day's journey of the property and he was chargeable with laches in not

sooner ascertaining and asserting his rights.

The foregoing considerations would, in the judgment of the Appellees require a decision in their favor, even if there had been any fraudulent representations made by the sub-agent of the Harding Land Company in the sale of the lands in question, and those representations had not been waived by the acts of the purchasers. The Appellees respectfully insist, however, that, as fully shown by the brief filed in this case upon behalf of the Appellant W. C. Harding Land Company, there was no fraudulent misrepresentation, though there was an innocent misrepresentation as to the adaptability of the land to the growing of peaches, but that was waived by the subsequent conduct of the purchasers, the agreements that pear trees might be substituted for the peach trees, and by other acts after the purchasers knew of the facts. We deem it unnecessary to repeat the analysis of the testimony contained in the brief of the Appellant W. C. Harding Land Company, as it would simply increase the labors of the Court. Appellees take the position that that brief shows that the plaintiffs have under the evidence no cause of suit against the W. C. Harding Land Company, and in that event of course there can be no claim against the Appellees.

Appellees further insist that not only does it clearly appear from the Record that there was no

fraudulent representation in connection with the sale of any of the lots in question; not only is the land in fact of a deep fertile character well adapted to orchard purposes; not only did each of the purchasers after full knowledge of the land, ratify his contract, with modifications as to peach trees, and accept his respective tract and thus fully affirm the contract, but a further and conclusive reason why this suit cannot be maintained as to the tracts sold to Glenn D. Hart and Ella Peterson is that prior to the commencement of the suit Ella Peterson and Glenn D. Hart assigned their contracts to the Appellant Mrs. Glenn D. Hart. These assignments amounted either to affirmtaions of the contracts or attempts to assign and transfer mere litigious rights. The affirmations of the contracts in this manner prevents the maintenance of suit for rescission. Cooper v. Hillsboro Garden Tracts, (Or.) 152 Pac. 488.

This case is on all fours with the case last mentioned, as regards the matter of affirmation of the contracts by assignment of the same prior to filing suit. As Cooper v. Hillsboro Garden Tracts is an Oregon case we ask especial attention to the decision of the Court and to that portion of the opinion which begins at page 152 Pac. 492, showing that there cannot in this case be any rescission so far as concerns the contracts of sale made to Ella Peterson and

Glenn D. Hart, because they have both assigned to the plaintiff Mrs. Glenn D. Hart. As the Record shows both of these assignments were made after the parties knew the land, and Hart's assignment was made more than two years before suit was filed, after he had made two visits to the land, and in the notice given to the trustee of the assignment he promises further remittances in a short time. See the Transcript of Record, page 88. As to the contract of Mrs. Hart herself there should be no rescission because of ratification and affirmance as elsewhere discussed in this brief, and in the brief of the Harding Land Company. It should be remembered that in all the transactions with reference to the land Glenn D. Hart acted as agent of his wife. She so states in her testimony, Transcript of Record, page 80.

The learned District Court refused to hold the Appellees liable in this suit, and we believe its decision in that respect was based upon the soundest principles of equity. Counsel for the Appellants Hart has not been able to suggest a single reason why his clients should be permitted to attach liability to persons with whom they made no contract, who made no represetnation, and of whom in fact they had never heard, until after they had ceased to make payments under their contracts. If it were in accordance with equity that those standing in the position of the Appellees should be held liable, the

question naturally arises as to the extent of their liability. This suit is brought for rescission of contract and to obtain repayment of the money paid by the purchasers of the land. Is it not then necessary as part of the case of complainants that they should trace the payments into the hands of the Appellees and show what proportions of the purchase price they actually received? Complainants have not sought to do this, but have based their suit upon the theory not only that the Appellees are liable, but that they are liable for every dollar paid to the W. C. Harding Land Company, together with interest thereon. They have apparently proceeded on the theory that their recovery against the Appellees could be as broad as though they had brought an action for damages instead of a suit for rescission. We take it that a suit for rescission is brought for the purpose of restoring the parties to their former condition. If the theory of the Appellants Hart is correct they can by suit for rescission accomplish the same thing as by an action for damages. This case shows no attempt whatever to trace any of the money paid by the purchasers into the hands of the Appellees. It seem to us, therefore, that on this point alone, a Court of equity will not, in a suit for rescission, hold the Appellees liable. In this connection, we can do no better than to ask attention to the case of Daniel v. Mitchell, Fed. Cases, No. 3562, 1 Story 172, cited by the Appellants Hart. The emin-

ent Mr. Justice Story applied there the equitable principle for which we are now contending. The suit was one for rescission of contract. The Bill called upon the defendants interested in the land sold, but who took no part in the negotiations for sale, to set forth their respective interests at the time of sale, and what portion of the consideration each received, and how the distribution was made among them. And the decree of rescission entered provided as follows: "And it is further ordered, adjudged and decreed by the court that the said James Todd (who received the purchase money) be, and hereby is held directly liable to the plaintiff for the whole amount of moneys paid as aforesaid, deducting, however, therefrom the proceeds of timber sold, as well as the value of the timber taken from said lands by and under the authority of the said Otis Daniel, (purchaser) and remaining unsold, and making all due allowances for all proper charges and expenses incurred in regard to said timber, and for taxes paid on said lands. And it is further ordered, adjudged and decree that such of the other parties, defendants to said bill, as **with a full knowledge of the premises,** or for whom the said Todd acted as agent, or who assented to the said contract of sale and conveyance, with a full knowledge of the premises, shall be, and hereby are decreed to be liable in aid and relief of the said Todd, to pay and deliver back to the said Otis Daniel such parts or

portions of the purchase money paid by the said Daniel for the said lands, as have been received by them respectively in the premises, or on the notes of the said Daniel so received by them, but no one of them to be liable for any purchase money or notes received by any of the other parties, defendants."

The case of Mason v. Crosby, 1 Woodb. & M. 342, Fed. Cases, No. 9234, also cited in the brief for Appellants Hart, is an authority very much in point. In that case the court refused to hold the land owners liable for any purchase money or notes delivered to the selling agent, who procured the sale through false representations, although the agent had become insolvent and had died. See discussion at page 1024 of 16 Fed. Cases.

If the Court in this case were to attempt to hold the Appellees liable it would have no guide as to the extent of that liability, except as shown by that part of their Answer which appears on page 19 of the Transcript of Record on Appeal.

As to the claim made on behalf of the Appellants Hart that the Appellees ratified the alleged acts of the Harding Land Company, we call attention to the fact that it is nowhere claimed in the evidence that the Appellees ever authorized or had any knowledge of any representations made in connection with the sale of the lots. There could be no

ratification without knowledge on the part of Appellees of what had taken place, and it was necessary that Appellees should know all the material facts and circumstances relative to the transaction. 2 Corpus Juris, page 476, section 93; O'Shea v. Rice (Neb.) 69 N. W. 308, 310; Murphy v. Clarkson (Wash.) 66 Pac. 51.

A further reason why the Appellants Hart cannot recover in this case against these Appellees is found in the fact that the contracts of sale under which the Appellants are claiming, were contracts in writing and under seal. As already pointed out these contracts did not contain the names of the Appellees, but were made by the W. C. Harding Land Company on the one part and the respective purchasers on the other part. See plaintiffs exhibits "E," "F" and "G," Transcript of Record on appeal, pages 67 to 71, inclusive. Appellants Hart are seeking to hold the Appellees liable as undisclosed principals, but the law is well settled that an undisclosed principal cannot be held liable upon a contract under seal executed by an agent in his own name. 2 Corpus Juris, 843, Section 524; 2 Mecham on Agency , 2nd ed., Section 1734. Both of these works cite many decided cases from different jurisdictions, as authority for this proposition. The same rule is recognized in Barbre v. Goodale, 28 Or. 465. See also Willard v. Wood, 135 U. S., 309, 313, 34 L. ed., 210, at 213; Badger Silver Mining Co., v.

Drake (Circuit Court of Appeals, 5th Circuit) 88 Fed. 48, 31 C. C. A. 378. Mr. Mehcem, in the section cited, says that the mere fact that the principal received the benefit of the contract does not, it is held, alter this rule. Seals are not abolished in Oregon.

Appellees believe that the rule quoted in the brief for Appellants Hart, point No. 11, page 18, reading as follows: "It is a firmly established rule of law that a principal is liable upon a written **simple** contract entered into by an agent in his own name within his authority," etc., is correct, but counsel seems not to have noticed the importance of the adjective "simple" in this statement. The authorities which he cites upon this proposition throughout his brief are found upon examination to be cases involving **simple** contracts and not specialties or contracts under seal.

In the case of Denike v. De Graaf (N. Y.) 87 Hun. 61, the action was to recover damages for deceit in a contract for the exchange of lands. The plaintiff claimed that one who had made a contract under seal for exchange of lands acted for plaintiff, and sought recovery for false representations of defendant. But the agreement was in the name of the alleged agent, and plaintiff was not mentioned. The Court points out that plaintiff could have maintained no action on the contract, citing Briggs v.

Partridge, 64 N. Y. 357, because as to agreements under seal it is not permitted to show that any of the parties acted as agent for a principal not named in the instrument. It was claimed that the rule applied only where the action was brought directly on the instrument, while here plaintiff was suing for fraud in inducing him to enter into the contract. The Court points out that plaintiff was in nowise bound in the contract or liable for its non-performance, and concludes that as the alleged agent was the only party who could have enforced the contract he was the only person who could disaffirm it. The complaint was dismissed.

In the case of Klein v. Mechanic & Traders Bank 145 N. Y. App. Div. 615 at page 617, the lower court had held that one not a party to a contract under seal may proceed against one who has had the benefit of the contract. The opinion on appeal reads, in part, as follows: "This holding is based upon a few lines found in the leading case of Briggs v. Partridge, (64 N. Y. 357) where the learned jurist writing the opinion says 'We find no authority for the proposition that a contract under seal may be turned into the simple contract of a person not in any way appearing on its face to be a party to or interested in it, on proof dehors the instrument, that the nominal party was acting as the agent of another, and especially in the absence of any proof that the

alleged principal has received any benefit from it or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal so as to embrace this case.' None of the authorities since that time, so far as we are able to discover, has ever thought that this reference to 'the absence of any proof that the alleged principal has received any benefit,' etc. was intended to modify the general rule. On the contrary the rule has been consistently maintained that, where the instrument is under seal, no person can sue or be sued to enforce the covenants therein contained, except those who are named as parties to the instrument and who signed and sealed it."

Byington v. Simpson, 134 Mass. 169, relied on by Appellant, was a case of a simple contract, not one under seal, and the opinion shows that the court recognized that fact and states the rule which it enforced as if applying only to simple contracts. Furthermore all parties to the contract understood the agency and who the principals were and the agent signed as "agent".

In the case of Alger v. Keith (cited by Appellants Hart as Alger v. Anderson) 105 Fed. 105. when the contract of sale was made, Anderson, the owner of the land, received directly notes for part of the purchase price in his own name, and at the time

executed his deed, he was therefore not an undisclosed principal. See the opinion at page 110. He himself also made false representations as to the land. See opinion page 113. He was therefore an active participant in the fraud, so that this case is not an authority in support of the contentions of Appellants Hart. Furthermore in this case it appeared that one Gonce, an innocent party, who received part of the price was held not liable upon rescission. See the opinion, 105 Fed. at 120.

As to Jurisdiction.

It appearing that Plaintiff cannot recover upon the assigned contracts, the amount involved is reduced to less than two thousand dollars and the Bill should be dismissed for lack of jurisdiction, there being no federal question in the case.

Farmington v. Pillsbury, 114 U. S. 143 29 L. ed. 114.

The Court should dismiss the suit of its own motion. The Supreme Court of the United States said in Morris v. Gilmer, 129 U. S. 315, 326, 32 L. ed. 690:

"But if the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit; and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will

correct, when the case is brought here for review. The rule is inflexible and without exception, as was said, upon full consideration, in Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 382 (28:462, 463) 'which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other Courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for himself, even when not otherwise suggested, and without respect to the relations of the parties to it.' To the same effect are King Bridge Co. vs. Otoe Co. 120 U. S. 225 (30:623); Grace v. Am. Cent. Ins. Co. 109 U. S. 278, 283 (27:932, 934); Blacklock v. Small, 127 U. S. 96, 105 (ante. 70) and other cases."

See also the later cases. Minnesota v. Northern Securities Co. 194 U. S. 48, 62; 48 L. ed. 870; Steigleder v. McQuesten 198 U. S. 141, 142, 49 L. ed. 986.

CONCLUSION.

We believe it appears from the Record that the land in question is substantially of the character and quality represented by the sub-agent Kendall, that the statements of Kendall and those contained in the literature of the Harding Land Company as to the adaptability of the land to the growing of peach trees as temporary "fillers" was innocently made, and was corrected afterwards by agreement of all parties concerned; that the land is thoroughly adapted to the growing of apple orchards, which was the chief purpose for which it was sold; that the purchasers after seeing the lands ratified and affirmed the contracts and their efforts to rescind after the boom had collapsed is not made in good faith; that the Appellees Adair, et al, should not be held to have made the Harding Land Company their agent, but even if the Court should be of contrary opinion the facts do not justify a decree against either the Land Company or the Appellees; that even if the Harding Land Company became the agent of Appellees the latter should not be bound by the alleged representations of a sub-agent whose appointment they did not authorize; that even the Harding Land Company as agent of Appellees would have no authority, under its restricted power to sell, to make representations as to the quality of the land; that on

the ground of laches alone the bill ought to be dismissed; that the learned District Court rightly refused to hold the Appellees Adair, et al, liable whatever may be said of the justice of its decree against the Harding Land Company; that Appellants Hart seek to charge the Appellees for the full amount of money paid to the Harding Land Company, without showing that the same ever came into the hands of the Appellees, and said relief is not equitable in a suit for rescission of contract; that the Appellees cannot be charged with ratification of the alleged acts of the Harding Land Company and its subagent, because it does not appear that they ever had knowledge, prior to the filing of the suit, of the alleged representations; that because of the assignment of the contracts issued to Mrs. Peterson and Glenn D. Hart prior to the filing of suit, these contracts were affirmed, and rescission will not be granted after affirmance and the court is without jurisdiction; that in any event the Appellees Adair, et al, cannot be held liable with reference to the contracts of sale upon any suit either in affirmance or disaffirmance of the same, for the reason that said contracts are under seal and Appellees are not parties to the same or mentioned therein, and the rule as to holding an undisclosed principal does not apply to contracts under seal.

For the foregoing reasons and because of the manifest lack of equity in the suit, which appears from the whole Record, we submit that the action of the lower Court in refusing to hold Appellees liable ought to be affirmed.

Respectfully submitted,

B. L. EDDY,
Solicitor for Appellees Adair, et al.

CERTIFICATE.

I, ...

Solicitor for ....

.....

hereby certify that the foregoing is a true and correct copy of the brief on behalf of said ....

.....

and of the whole thereof in the within entitled cause.

.....

Solicitor for ....

.....

ACKNOWLEDGMENT OF SERVICE.

STATE OF OREGON, }
COUNTY OF_____ } ss.

I hereby acknowledge service of the brief of

.....

in the within entitled cause on me in ....

.....County, Oregon, this .....

day of April, 1916, by receipt personally of a duly certified copy thereof.

.....

Solicitor for ....

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